

who *alleged* preference, because he offered to prove the wadset satisfied and extinct, in so far as it being burdened with a back-tack, the wadsetter, without consent or authority of law, had entered in possession, and his intromissions did exceed the whole sums of wadset, principal and annualrent.—It was *alleged*, That this allegiance not being founded upon any article in the contract of wadset, but upon an unwarrantable intromission of the pursuer's author, it is not receiveable by way of exception, but by action of declarator of the expiring of the wadset by satisfaction; for though the Lords have sustained the satisfaction of appraisings by exception or reply, they have never done so in wadsets.

THE LORDS found the defence not competent by way of exception.

Fol. Dic. v. 1. p. 177. Stair, v. 2. p. 13.

1683. *March 13.* SIR DAVID THOIRS *against* SIR ALEXANDER FORBES.

SIR DAVID THOIRS's action against Sir Alexander Forbes of Tolquhon is referred to Redford, to hear them on the reason of minority and lesion, through the disposition made by Tolquhon; and that being proven, then ordained them to compt and reckon together, anent the onerous adequate cause paid by Tolquhon for the same. *See IMPROBATION.*

December 20. 1683.—The case between Sir David Thoires advocate, and Sir Alexander Forbes of Tolquhon, being reported by Redford; the LORDS found, by the qualifications alleged on, That Tolquhon did act as pro-tutor, and therefore must have no more allowed for the gift of the ward, but what truly he paid for it to Sir William Purves, and grant diligence for citing Sir William Purves to depone what he did get therefor; as also ordain Tolquhon to depone thereanent: And find, That Tolquhon must compt for his intromissions with the rents of the ward-lands; and as to the article of the inventory of debts founded on by Tolquhon, to make up the onerous cause of his disposition, find it must be allowed to Tolquhon, as a debt to affect the minor, he instructing that he paid them out; which he doing, he is to have allowance thereof out of the rents of the lands uplifted by him; and if the rents do fall short, the minor is to be liable for the superplus; and remit to the Reporter to consider the instructions that the debts in the inventory are paid by Tolquhon, and to allow what he shall see instructed; and find, That Tolquhon's obligation to relieve the minor of his second brother's portion was a lesion, in respect he was not obliged to pay the debt; and find, That Tolquhon must compt and reckon notwithstanding of his defence founded on his expired comprising, in respect of the posterior transaction for the sum of 10,000 merks, which the LORDS allow him with the annualrents; though that transaction was never fulfilled to him, seeing he hath not obtained a declarator annulling it on that head.

VOL. VII.

16 B

No 93.
by declarator,
that a wadset
was extinct
by intromis-
sion.

No 94.
In a competi-
tion betwixt
two creditors
on an estate,
the one found-
ing on a base
infetment of
ward lands,
and the other
repeating a
declarator
of recognition
he had against
him, the
Lords re-
ceived the
declarator
even *hoc*
ordine.

No 94.

Tolquhon gave in a bill against this interlocutor; which being considered on the 2d January, and also heard then in presence; the LORDS rectified it in some particulars; finding him still pro-tutor to John Forbes, but refusing to allow Sir William Purves to depone; but ordain Tolquhon to depone in presence of Sir William; and grant diligence for citing Sir William to be present when he depones: And they sustained the list of the debts, in so far as Tolquhon can instruct that they were justly resting, and satisfied by him, to be an onerous cause of his disposition *pro tanto*: As likewise sustained the article of 6000 merks resting to the relict and children, to come *in computo* of the onerous cause, in respect they find that Tolquhon was not only obliged to relieve the minor, but also to pay it and retire discharges; also sustained that article of 2000 merks, payable to the said John Forbes or his creditors, at the said John's ratification of the disposition, after his majority; and allow Sir David the pursuer to defalk out of the said articles allowed to Tolquhon as the onerous cause, any intromission had by Tolquhon with the mails and duties of the lands, and other goods which did belong to John Forbes, before the disposition; and grant a mutual probation to both parties to prove the rents of the lands, and the price that such lands did then give in that country; and remit to the Lord Reporter to make the compt and to report, to the effect the Lords may find and consider, whether there was a lesion to the minor by the bargain and disposition or not; and find Tolquhon cannot exclude the pursuer by the expired comprising, in respect of the minute whereby he hath transacted and restricted it to the sum of 10,000 merks; as to which sum of 10,000 merks, with the interest thereof since the date of the minute, they sustain the comprising as yet current, and redeemable for that sum.

December 24. 1684.—Sir David Thoirs's action against Sir Alexander Forbes of Tolquhon, was called; and it being *alleged*, That Patrick Forbes, Sir David's author, did represent his father, who entered into the minute with Tolquhon, because he intromitted, and yet could not ascribe the title of his possession to the comprising, because he had not entered *via juris*, by pursuing for mails and duties on the said comprising; THE LORDS, before answer, ordained the said apprising, and other papers, to be produced.

March 17. 1685.—In the debate betwixt Sir Alexander Forbes of Tolquhon and Sir David Thoirs, mentioned 24th December 1684, Tolquhon founding on a base infetment of ward lands, Sir David repeated a declarator of recognition he had against him on that head.—*Answered*, Tolquhon must be preferred *hoc loco*, reserving to Sir David to insist in his recognition as accords.—THE LORDS received it *hoc ordine*.—Then Tolquhon *alleged* against it, That there was no recognition incurred; because the base infetment flowed upon a disposition from a goodsire to his grandchild by his daughter, who was *alioqui successurus*.—*Answered*, He had three daughters, heirs-portioners, and this was but

the son of one of them, and so it would at least recognise *quoad* two parts.—*Replied*, By a public tailzie, Patrick Forbes had provided these lands to the eldest son of the eldest daughter; which the LORDS found relevant.—Then having advised the oaths of Irvine of Arnage and Bailie Drum, anent the extinction and payment of the comprising of Sir David's author by the common debtor's means; though Sir David *alleged*, *imo*, That the cedent's oath could not militate against assignees; *2do*, *Multo minus* after they were denuded; they waved that point, and found Tolquhon behoved first to be paid off the 10,000 merks, to which, by the minute, he had restricted his comprising, as mentioned *supra*.

No 94.

June 15. 1688.—Sir David Thoirs's and Sir Alexander Forbes of Tolquhon's case being advised, Sir David gains the interlocutor, and is freed from the contract of 10,000 merks, which was one of the sums wherewith Tolquhon sought to burden the lands, which Sir David was seeking to redeem by the compt and reckoning. See MINOR.

Fol. Dic. v. 1. p. 177. Fountainball, v. 1. p. 225. 251. 327. 353. & 507.

1766. January 17.

ALEXANDER M'ADAM *against* ALEXANDER EARL OF GALLOWAY.

IN 1678, Alexander, then Earl of Galloway, granted an obligation to Henry Dun, binding himself to denude, in his favour, of a piece of land called Belscroft, upon payment of L. 400 Scots.

In 1763, John M'Adam, the great grandson of Henry Dun, granted bond to Alexander M'Adam, his son, who led an adjudication against him, as charged to enter heir in those lands to Henry Dun; and, upon that title, pursued an action of mails and duties against the tenants.

Compearance was made for the Earl of Galloway, who produced a sasine in the lands of Belscroft, in 1684, proceeding on the precept of Henry Dun; and *contended*, That, as he and his predecessors had possessed the lands immemorially, the process was incompetent, till his titles should be reduced in a proper action.

Answered for the pursuer. The adjudication is a sufficient title against the tenants, Stair, IV. 22. 7. They are the only defenders called. The compearance of the Earl, indeed, produces a competition, but it is a rule of law, that all competitions imply mutual reductions. Nor is the pursuer under any necessity of instructing the right of the predecessor, to whom his father was charged to enter. The only title produced by the Earl, is a sasine upon the precept of that very predecessor, whose right he cannot object to, without cutting the branch upon which he himself stands.

No 95.
Found incompetent, by an action of mails and duties, to set aside the right of a person in immemorial possession, and producing a sasine. Reserved to insist in a reduction of the defender's rights.